91-608

Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

_____ TERM, 1991

N.W. ENTERPRISES, INC.
Petitioner

v.

THE STATE OF TEXAS
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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August, 1991

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QUESTIONS PRESENTED

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION TO QUASH THE COMPLAINTS, AND MOTION TO QUASH THE INFORMATIONS, BECAUSE THE AFFIANT FAILED TO AVER PERSONAL KNOWLEDGE, AND THE COMPLAINT IS DEFECTIVE IN NOT PROVIDING A SUFFICIENT BASIS UPON WHICH A FINDING OF PROBABLE CAUSE COULD BE MADE. 3

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION TO QUASH THE COMPLAINTS AND THE INFORMATIONS, BECAUSE BOTH ARE AMBIGIOUS AND FAIL TO ADEQUATELY DESCRIBE THE PERSONAL PROPERTY ALLEGED TO BE OBSCENE. 4

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LIST OF INTERESTED PARTIES

1. N.W. Enterprises, Inc., Houston, Texas, Petitioner.
2. Gerald E. Hopkins, 4920 Center Street, Houston, Texas 77007, Attorney for Petitioner.
3. The State of Texas, by and through the Harris County District Attorney, John Holmes, Houston, Texas, Respondent.

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v.

THE STATE OF TEXAS
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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Petitioner prays that a writ of certiorari issue to review the Order and Judgment of the Court of Criminal Appeals of Texas entered April 3, 1991, affirming, on Petition for Discretionary Review, the Judgment of the Court of Appeals, Eighth District of Texas, El Paso, Texas, entered November 14, 1990, affirming the conviction of Petitioner on June 21, 1989 in two cases of the offense of promotion of obscene material under Section 43.23(c), Texas Penal Code.

OPINION BELOW

Attached is Appendix A with the trial court judgments entered June 21, 1989.

Attached as Appendix B is the Judgment and Opinion of the Eighth Court of Appeals of Texas, El Paso, entered November 14, 1990, which is unpublished.

Attached as Appendix C is the notice from the Court of Appeals of Texas refusing the Petition for Discretionary Review on April 3, 1991, without opinion.

Attached as Appendix D is the Order of the Eighth Court of Appeals of Texas entered July 10, 1991, staying the mandate until September 1, 1991.

JURISDICTION

Jurisdiction of the Court is invoked under 28 U.S.C. Sec. 1254(1), seeking review by the Supreme Court by writ of certiorari in a criminal case after rendition of judgment.

STATUTORY PROVISIONS INVOLVED

This case involves Section 43.23(c), Texas Penal Code (obscenity); Article 15.05(2), Texas Code of Criminal Procedure (permitting issuance of a complaint unsupported by an affidavit averring personal knowledge of the offense); and Article 21.09, Texas Code of Criminal Procedure (requiring the charging instrument to allege ownership of the material, or that ownership was unknown); and Article 17.A.08, Texas Code of Criminal Procedure (denying the benefits of probation to a corporation).

STATEMENT OF THE CASE

N.W. Enterprises, Inc., a Texas corporation, was convicted by a jury on June 21, 1989, in two cases of the offense of promotion of obscene material (four magazines) under Section 43.23(c), Texas Penal Code.

The magazines were purchased by an undercover vice officer on January 23, 1989. Misdemeanor charges were

filed against the corporation and each clerk. The state tried the corporate cases together, prior to trying either clerk's case.

The complaints (the charging instruments) did not show on their face the identity nor capacity of the complainant. The magazines were misidentified and misnamed. The complaint failed to describe the magazines involved, and failed to charge in what manner the magazines were obscene.

The complaint was ambiguous in ascribing knowledge of the content and character. The magazines were covered with opaque sleeves which obscured the greater portion of the magazine covers. Except for their presence in the store, and the performance of their duties as retail sales clerks, there was no evidence that the clerks, as agents, knew the content and character of the magazines. If obscene, as the jury found, the corporation and the clerks both made a mistake of fact in not knowing the community standard. The corporation, upon conviction, was denied the benefits of adult probation, including probation of the $5,000.00 fine levied in each of the two cases.

QUESTION PRESENTED

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION TO QUASH THE COMPLAINTS, AND MOTION TO QUASH THE INFORMATIONS, BECAUSE THE AFFIANT FAILED TO AVER PERSONAL KNOWLEDGE, AND THE COMPLAINT IS DEFECTIVE IN NOT PROVIDING A SUFFICIENT BASIS UPON WHICH A FINDING OF PROBABLE CAUSE COULD BE MADE.

ARGUMENT

A complaint must contain an affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it must indicate the source for the complainant's belief; and it must set forth other sufficient basis upon which a finding of probable cause could be made. *Giordenello v. United States,* 357 U.S. 480, 78 S. Ct. 1245 (1958).

Article 15.05(2), Texas Code of Criminal Procedure (T.C.C.P.) permits the affiant merely to state "that he has good reason to believe and does believe . . ." that the accused has committed an offense.

Article 15.05(2), T.C.C.P. does not satisfy the requirements of *Giordenello,* nor the 4th Amendment. The fact that the State tracks Article 15.05(2), lends no validity to the complaint.

The trial court should have granted the motions to quash.

QUESTION PRESENTED

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION TO QUASH THE COMPLAINTS AND THE INFORMATIONS, BECAUSE BOTH ARE AMBIGIOUS AND FAIL TO ADEQUATELY DESCRIBE THE PERSONAL PROPERTY ALLEGED TO BE OBSCENE.

ARGUMENT

The complaints are ambiguous. A reasonable man cannot determine from the face of the complaints whether the State is charging an offense based on the sale of one

magazine on each complaint, or two. Neither do they allege the ownership of the property (magazines), or lack of such knowledge, as required by Article 21.09, T.C.C.P.

A complaint must (1) allege all elements of the offense; (2) sufficiently apprise defendant of the charges it will have to meet; and (3) protect it against subsequent prosecution for the same offense. *United States v. Anderson,* 368 F. Supp. 1253 (D.C. Md. 1973). The sufficiency of a complaint must be determined from the face of the instrument, and the court cannot consider extrinsic evidence. *United States v. Luros,* 243 F. Supp. 160 (D.C. Iowa 1965), *cert. denied,* 382 U.S. 956, 86 S. Ct. 433.

In this case, the fact that Petitioner was able by discovery and by self-help to ferret out of its inventory the correct magazines, and have affirmed in pre-trial hearing that indeed these were the ones purchased by the undercover vice officers, does not cure the defect in the complaints. The complaints as used at trial remained defective, and subsequent complaints issued on correctly named magazines, totaling four (4), could support a subsequent prosecution. *See, United States v. Keller,* 730 F. Supp. 151 (N.D. Ill. 1990).

On the issue of ownership, the State has elected to ignore the requirement of Art. 21.09, and the state appeals courts have concurred by arguing that the complaint and information implicitly allege ownership in the allegation of a sale. A sale does not necessarily imply ownership. *See, United States v. Barbato,* 471 F.2d 918 (C.A.R.I. 1973); *United States v. Cluchette,* 465 F.2d 749 (9th Cir. 1972). By failing to track the statute, the State has failed to follow the law, and the complaint and

information do not set forth fully, directly and clearly all the essential elements of the crime to be punished. *United States v. Crow,* 824 F.2d 761 (9th Cir. 1987).

QUESTION PRESENTED

THE TRIAL COURT ERRED IN DENYING PETTIONER'S MOTIONS TO QUASH THE COMPLAINTS AND INFORMATION BECAUSE THEY FAILED TO CHARGE HOW THE MAGAZINES WERE OBSCENE.

ARGUMENT

To defend the charges, Petitioner must defend against the allegations that the magazines were obscene. Section 43.21, Texas Penal Code, sets forth 22 ways in which what the material "depicts or describes" might be obscene. In addition, Petitioner was charged with "promotion" of obscene material. Section 43.21 sets forth 32 ways to promote. The complaints and information allege "promotion", and further describe the manner, namely, that Appellant "did interntionally sell" the magazines. Petitioner, however, is left to speculate on the manner in which the magazines might be obscene. This is not evidentiary; it is an element of the offense and must be charged. *Smith v. United States,* 505 F.2d 824 (6th Cir. 1974); *United States v. Peisner,* 311 F.2d 94 (4th Cir. 1962). Furthermore, failure to allege the acts to be obscene leaves the jury unbridled discretion to determine what is obscene. *Jenkins v. Georgia,* 418 U.S. 153 (1974).

QUESTION PRESENTED

THERE IS INSUFFICIENT EVIDENCE THAT PETITIONER KNEW THE CONTENT AND CHARACTOR OF THE MATERIAL ALLEGED TO BE OBSCENE.

ARGUMENT

The agent worked as a retail sales clerk for Petitioner, and performed the normal duties of accepting the merchandise chosen by the customer, confirming the price as marked, taking the customer's money, operating the cash register, making change, and bagging the magazines. Other than these normal clerk's duties, there is no evidence the agent did anything more than would constitute evidence beyond a reasonable doubt that he knew the content and character of the material sold. Most critical, however, is the fact that the magazines were covered by opaque white paper sleeves, which even when moved, obscured whatever the covers depicted. An inference that the agent may have known that the material sold was "adult" or sexually explicit does not establish that the agent knew the material was obscene, nor rise to the level of scienter needed for an obscenity conviction. After viewing the evidence in the light most favorable to the state, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307 (1979).

QUESTION PRESENTED

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT PETITIONER MUST PROVE THE AFFIRMATIVE DEFENSE OF DUE DILIGENCE BEYOND A REASONABLE DOUBT.

ARGUMENT

The exercise of due diligence to prevent commission of an offense is an affirmative defense under Section 7.24(a), Texas Penal Code, and must be established by a preponderance of the evidence. Section 2.04(d), Texas Penal Code. The trial court, in charging the jury that Petitioner carried a burden of proof "beyond a reasonable doubt", committed fundamental error, placed an unconstitutional due process limitation on the Petitioner, *Morrisson v. People of the State of California,* 291 U.S. 82 (1934), and unconstitutionally shifted the burden of proof to Petitioner. *Francis v. Franklin,* 471 U.S. 307 (1985).

QUESTION PRESENTED

THE TRIAL COURT ERRED IN THE CHARGING PARAGRAPH OF THE JURY INSTRUCTION BY ASSUMING A DISPUTED FACT, THAT IS, THAT THE MATERIAL WAS OBSCENE.

ARGUMENT

The trial court violated due process by giving a jury instruction which commented on the evidence or assumed a disputed fact. The courts of appeal failed to follow their own case holding erroneous an instruction assuming that the material was obscene. *Andrews v. State,* 652

S.W.2d 370 (Tex. Crim. App. 1983). Such an instruction constitutes fundamental error by violating due process, and denying Petitioner a fair trial.

QUESTION PRESENTED

THE TRIAL COURT ERRED IN OVERRULING PETITIONER'S REQUEST TO INSTRUCT THE JURY THAT BEFORE THEY COULD FIND PETITIONER GUILTY OF PROMOTING OBSCENE MATERIAL, THEY MUST FIND THAT PETITIONER KNEW THE MATERIAL WAS OBSCENE.

ARGUMENT

An obscenity statute must contain the element of scienter to be constitutionally valid. *Smith v. California,* 361 U.S. 147 (1959). The *Smith* Court did not pass on "what sort of mental element is requisite to a constitutionally permissible prosecution" but did speak in terms of "knowledge", "notice of the character of the books they sold" at 152, "knowledge of the contents" at 153, "reason to suspect their obscenity" at 151, and did say it could be proved by circumstantial evidence.

After *Smith v. California,* the Supreme Court failed to clarify "what sort of mental element is requisite". In *Mishkin v. New York,* 383 U.S. 502 (1966), it upheld a New York statute as constitutionally sufficient which contained no scienter language at all as "instinct with the idea" and adopted the lower court's interpretation that ". . . (a) reading of the statute. . . . as a whole clearly indicated that only those who are in some manner aware of the character of the material . . . . should be punished". *People v. Finkelstein,* 174 N.E.2d 470 (1961). New

York, uncomfortable with the vagueness of the *Mishkin,* decision, amended its obscenity statute to include "knowingly" and this was found constitutionally sufficient in *Ginsberg v. New York,* 390 U.S. 629 (1968).

Closer to home, in *State v. Scott,* 460 S.W.2d 103 (Tex. 1970), the Texas Supreme Court upheld the scienter element of the prior obscenity statute, Sec. 1(F), Art. 527, P.C., even though defined in terms of constructive knowledge based on tort standards. Significant, however, is the Court's reliance on the then-recent federal decision upholding the Georgia statute which contained the scienter element in terms of "knowing the *obscene nature* thereof. . . ." (emphasis added). *Great Speckled Bird of Atlanta Cooperative News Project v. Stynchcombe,* 298 F. Supp. 1291 (N.D. Ga. 1969). The new or current Texas obscenity statute has not been reviewed as to scienter. Although Section 43.23 underwent constitutional scrutiny in *Red Bluff Drive-In, Inc. v. Vance,* 648 F.2d 1020 (5th Cir. 1981), *cert. denied,* 435 U.S. 913 (1982), the Court abstained on the scienter issue limiting itself to dictum that Section 43.23 required that ". . . the State must establish that a defendant knew the content and character of the prosecuted item . . .". At 1030.

In *McMahon v. State,* 630 S.W.2d 730 (Tex. App.—Houston [14th Dist.] 1982), overruled, *Davis v. State,* 658 S.W.2d 572 (Tex. Crim App. 572, 580 (1983)), Texas took a step backwards. While admitting that Section 43.23 did not define "knowing the content of the material", the Court held that it required only "knowledge of the general subject matter of the material" at 733 and readily applied the now unconstitutional presumption that

any person who promotes obscene material is presumed to know its content and character.

In *Skinner v. State,* 647 S.W.2d 686 (Tex. App.—Houston (1st Dist.) 1982), this Court struck down the presumption with language as follows:

> Subsection 43.23(e) eliminates "scienter" as an element of the offenses of promotion or wholesale promotion of obscenity. Since the presumption supplies the necessary inference *that the defendant "knew"* the material was *obscene,* the State to prove the requisite culpable "intent," need only show that the defendant promoted or possessed it. Thus, by use of the presumption, scienter is automatically established and actual proof of this element is circumvented.
>
> at 690 (emphasis added).

In *Davis v. State,* 658 S.W.2d 572 (Tex. Crim. App. 1983 en banc), the Court of Criminal Appeals agreed with this Court in *Skinner* and struck down the presumption of Section 43.23(e). In doing so, the Court enumerated the constitutional dangers:

(1) The presumption operatively eliminated the scienter element;

(2) A person could be convicted of promoting obscenity by merely distributing a publication *later determined to be obscene.*

The Court made its point well at page 579-580:

> No matter how large the establishment, or how numerous and varied the publications or the films on the shelves and on the inside of the premises

> might be, nevertheless, if a book, magazine, or film is found thereon and it is later determined that such is obscene, any owner, proprietor, manager, exhibitor, or clerk could be convicted even though such person would not have the slightest idea of what the content and character of the book, magazine, or film might be. We are unable to state that a merchant making available to the general public books, magazines, and films will know the content and character of each one of those books, magazines and films. The risk of suppressing freedom of expression is not just negligible in such instance; it rises to astronomical proportions. In this instance, from the record of appeal, we are informed that the bookstore contained magazines and books, and that the projectors inside the booths probably had films different from the film entitled "Little Yummy". We are not, however, told what the content and character of the magazines, books, or other films portrayed, revealed, or depicted, and it is not our function to speculate upon what that might be.

(3) Further, there is the problem of self-censorship, namely, "that the bookseller will tend to limit his stock to books which he has read and can guarantee." At 578.

The statutory phrase "knowing its content and character" in the context of Section 43.23 taken as a whole means "knowing its content and character *was obscene*". It does not mean "knowing its content and character was *maybe obscene . . . . might be obscene . . . could possibly later be adjudicated obscene . . . could be obscene because the publication next to it had been found obscene,* and so forth. Nor does it mean, as suggested in *McMahon v. State,* 630 S.W.2d 730, *supra,* "knowledge of the general subject matter of the material". To be constitutionally sound, the phrase must be construed to mean that the

defendant knew, before he sold the material—the specific material being prosecuted—that its content and character were obscene, and such an instruction should be given to the jury. This in no way limits the right or ability of the State to present any evidence, direct or circumstantial, it may have to prove scienter, *Shealy v. State,* 707 S.W. 2d 683, 685 (Tex. App.—Houston [1st Dist.] 1986), but instead protects the defendant's presumption of innocence and eliminates the constitutional dangers enumerated in *Davis v. State,* 658 S.W.2d 572, *supra.*

Article 36.14, Texas Code of Criminal Procedure, sets forth the requirements for the charge of the court:

(1) it must set forth the law applicable to the case;

(2) it must not express any opinion as to the weight of the evidence;

(3) it must not discuss the facts nor use any argument;

(4) it must not arouse the sympathy or excite the passion of the jury.

By failing to charge that the defendant could be found guilty only if he knew the content and character of the material was obscene, the trial court failed to set forth the law applicable to the case and eliminated from the State's burden a key element of the offense it had to prove. *Knighton v. State,* 666 S.W.2d 386 (Tex. App.—Houston [1st Dist.] 1984).

QUESTION PRESENTED

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S REQUEST TO INTRUCT THE JURY ON THE DEFENSE OF MISTAKE OF FACT.

ARGUMENT

Mistake of fact is a general defense under Section 8.02, Texas Penal Code.

> (a) It is a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for commission of the offense. (b) Although an actor's mistake of fact may constitute a defense to the offense charged, he may nevertheless be convicted of any lesser included offense of which he would be guilty if the fact were as he believed.

Whether or not material is obscene is a fact issue for the jury. *Carlock v. State,* 609 S.W.2d 787 (Tex. Crim. App. 1980). As presented by the statute, Sec. 43.21, P.C., there are 3 ultimate issues of fact to be decided by the jury:

(1) Whether the average person, applying contemporary community standards, would find that taken as a whole the material appeals to the prurient interest in sex;

(2) Whether the material depicts or describes at least one of the proscribed sex acts; and

(3) Whether taken as a whole, the material lacks serious literary, artistic, political, and scientific value.

The Petitioner took numerous steps to avoid violating the obscenity statute. The merchant is not required to, and cannot reasonably be expected to, review each and every magazine, book or film presented for sale in its store. *Skinner v. State,* 647 S.W.2d 686 (Tex. App [1st Dist.]

1982). *Davis v. State,* 658 S.W.2d 572, 579 (Tex. Crim. App. 1983, en banc). If however, the merchant, as Petitioner here, sells material which a jury subsequently finds obscene under the 3-prong *Miller* test, a legitimate factual question arises whether this was a mistake of fact on Petitioner's part, or whether, as a matter of law the evidence shows a total disregard on the Petitioner's part with respect to whether or not the material might be obscene. The Petitioner obviously must decide every day whether material offered for sale is obscene or merely sexually explicit. If found obscene, and absent evidence of total disregard, Petitioner ipso facto made a mistake; he misjudged the material, its intrinsic value, if any, and the community.

Further, Ray Hill, Petitioner's witness testified at length regarding the Houston and the Texas communities, and that, in his opinion, the relevant "community" was so diverse that it was impossible to determine what was the "contemporary community standard. . . in Texas". This evidence, when viewed in context with the total lack of evidence on this point from the state, raised a fact issue whether the material was obscene. Secondly, this issue, viewed in the context of Petitioner's efforts to avoid a violation of the obscenity statute clearly raises the issue of mistake of fact. *See, Brewer v. State,* 659 S.W.2d 441 (Tex. Crim. App. 1983) (entire state rather than county is the applicable geographical area for determining contemporary community standards); *Berg v. State,* 599 S.W.2d 802 (Tex. Crim App. 1980) (jury must determine what are contemporary community standards before it can decide whether material is obscene); *Andrews v. State,* 639 S.W.2d 4 (Tex. App.

—Houston [1st Dist.] 1982), aff'd in part, rev'd in part on other grounds, 652 S.W.2d 370.

The State argued at trial that an instruction of the defensive issue of mistake of fact should be denied because.

> "There is no evidence an mistake of fact raised at all. There is no evidence that there was a mistake made."

The mistake of fact defense is based solely on the mistaken belief of the actor. The conduct of others is considered only to the extent that such conduct contributes to the actor's mistaken belief and for no other reason. *Montgomery v. State,* 588 S.W.2d 950 (Tex. Crim. App. 1979). *Kennard v. State,* 649 S.W.2d 752 (Tex. App.—[2d Dist.] 1983). At trial, Petitioner exercised its right not to testify. However, when that right is implicated, it is not necessary for Petitioner to testify to mistake of fact where the testimony of other witnesses—here Ray Hill and both police officers—reflected that exculpatory contention. *Woodfax v. State,* 742 S.W.2d 408 (Tex. Crim. App. 1987, en banc). When a defensive issue is raised by the evidence *from any source* and a charge is properly requested, it must be submitted to the jury. *Horne v. State,* 607 S.W.2d 556 (Tex. Crim. App. 1989). Petitioner's requested charge was timely made, sufficient in all respects, Sec. 2.03 Texas Penal Code, *Hefner v. State,* 735 S.W.2d 608 (Texas App.—Dallas 1987), and should have been granted.

QUESTION PRESENTED

ARTICLE 17A.08, TEXAS CODE OF CRIMINAL PROCEDURE, WHICH DENIES THE BENEFITS OF THE ADULT PROBATION LAWS TO CORPORATIONS, IS ARBITRARY AND WITHOUT RATIONAL BASIS, AND VIOLATES APPELLANT'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION.

ARGUMENT

> "The benefits of the adult probation laws shall not be available to corporations and associations."

A corporation is a "person", art. 17A01(b)(4), and can be prosecuted for promotion of obscenity under Sec. 43.23, Texas Penal Code. Absent the specific prohibition of Art. 17A.08, a corporation presumably would be eligible for adult misdemeanor probation with respect to the imposition of a fine. Art. 42.12, Sec. 3, Sec. 3a(b), T.C.C.P.

Art. 17A.08 appears totally arbitrary, and makes a distinction as to corporate eligibility without a rational basis, thus unfairly denying Petitioner an opportunity for probation. Petitioner applied for probation, and the without evidence. U.S. Constitution, 14th Amendment; Texas Constitution, Art. 1, Sec. 19 and Art. IV, Sec. 11A; *Rivas v. State,* 627 S.W.2d 494 (Tex. App.—San Antonio 1982).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The federal questions were raised below on pre-trial motions and during trial. All questions on appeal were

decided against Petitioner on the grounds that they were (1) not preserved, (2) not fundamental error, or (3) harmless error.

REASONS FOR GRANTING THE WRIT

There is a disturbing trend recently in obscenity cases to shift the burden to the accused. Prosecution of obscenity cases has deteriorated to nothing more than introduction by the State of the material against the accused. This case presents a cumulative picture of such practice, and is replete with due process error, even to the extent that the appellate courts ignore the requirements of the State's own case and procedural law in order to affirm a conviction. The problem of obscenity, and what it is, the fundamental questions of scienter on the part of retail clerk, and federal questions of due process and fundamental fairness require that the Court grant this writ.

CONCLUSION

Petitioner prays that his Petition for Writ of Certiorari be granted.

Respectfully submitted this _____ day of September, 1991.

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Counsel for Petitioner

APPENDIX A

COUNTY CRIMINAL COURT AT
LAW NO. 7
HARRIS COUNTY, TEXAS

DOCKET NO. 8904493

THE STATE OF TEXAS

v.

N.W. ENTERPRISES, INC.

(Filed June 19, 1989)

JUDGMENT

It is therefore CONSIDERED, ORDERED, AND ADJUDGED by the Court that the Defendant is guilty of the offense indicated above, a misdemeanor, and that the said Defendant committed the said offense on the date indicated above and that he be punished as indicated above, and that the State of Texas do have and recover of the Defendant all costs of the prosecution, for which execution will issue.

And thereupon the said Defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof. Whereupon the Court proceeded, in the presence of said Defendant, to pronounce sentence against him as follows, to wit: "It is the order of the Court that the Defendant, named above who has been adjudged to be guilty of offense indicated above, a misdemeanor, and whose punishment has been assessed as indicated

above, forthwith be committed to the custody of the Sheriff of Harris County, Texas, who shall confine him in the Harris County Jail for the period indicated above, and until the fine and costs are fully paid and satisfied in accordance with law.

And credit the defendant as indicated above.

**TO BE COMPLETED ONLY WHEN IMPOSITION OF SENTENCE SUSPENDED AND DEFENDANT GRANTED PROBATION.

[ ] On this the day of , 19 imposition of this sentence is suspended and defendant is placed on Misdemeanor Adult Probation for months/years pending his abiding by and not violating the following terms and conditions of probation, approved by this court and attached as a part of this judgment herewith.

PROBATION EXPIRES 19 .

Signed and entered this the 21 day of June, A.D. 1987.

To which action of the Court the Defendant then and there, in open Court excepted and gave notice of appeal to the Court of Appeals of the State of Texas, in Houston, Texas.

**TO BE COMPLETED ONLY WHEN IMPOSITION OF SENTENCE SUSPENDED AND DEFENDANT GRANTED PROBATION.

CLERK OF THE COURT FURNISHED THE PROBATIONER WITH A COPY OF THE TERMS AND CONDITIONS OF PROBATION.

And inasmuch as said Defendant has given notice of herein, execution of the sentence is deferred to await the judgment and order of our Court of Appeal in this behalf.

Bail in the sum of NA is allowed the Defendant herein pending appeal.

/s/ Signature Illegible
Judge, County Criminal Court of
Law No. 7 of Harris County, TX.

COUNTY CRIMINAL COURT AT
LAW NO. 7
HARRIS COUNTY, TEXAS

DOCKET NO. 89-04494

THE STATE OF TEXAS

v.

N.W. ENTERPRISES, INC.

(Filed June 19, 1989)

JUDGMENT

It is therefore CONSIDERED, ORDERED, AND ADJUDGED by the Court that the Defendant is guilty of the offense indicated above, a misdemeanor, and that the said Defendant committed the said offense on the date indicated above and that he be punished as indicated above, and that the State of Texas do have and recover of the Defendant all costs of the prosecution, for which execution will issue.

And thereupon the said Defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof. Whereupon the Court proceeded, in the presence of said Defendant, to pronounce sentence against him as follows, to wit: "It is the order of the Court that the Defendant, named above who has been adjudged to be guilty of offense indicated above, a misdemeanor, and whose punishment has been assessed as indicated

above, forthwith be committed to the custody of the Sheriff of Harris County, Texas, who shall confine him in the Harris County Jail for the period indicated above, and until the fine and costs are fully paid and satisfied in accordance with law.

And credit the defendant as indicated above.

**TO BE COMPLETED ONLY WHEN IMPOSITION OF SENTENCE SUSPENDED AND DEFENDANT GRANTED PROBATION.

[ ] On this the day of , 19 imposition of this sentence is suspended and defendant is placed on Misdemeanor Adult Probation for months/years pending his abiding by and not violating the following terms and conditions of probation, approved by this court and attached as a part of this judgment herewith.

PROBATION EXPIRES 19 .

Signed and entered this the 21 day of June, A.D. 1987.

To which action of the Court the Defendant then and there, in open Court excepted and gave notice of appeal to the Court of Appeals of the State of Texas, in Houston, Texas.

**TO BE COMPLETED ONLY WHEN IMPOSITION OF SENTENCE SUSPENDED AND DEFENDANT GRANTED PROBATION.

CLERK OF THE COURT FURNISHED THE PROBATIONER WITH A COPY OF THE TERMS AND CONDITIONS OF PROBATION.

And inasmuch as said Defendant has given notice of herein, execution of the sentence is deferred to await the judgment and order of our Court of Appeal in this behalf.

No Bond Required.

/s/ Signature Illegible
Judge, County Criminal Court of
Law No. 7 of Harris County, TX.

APPENDIX B

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

NO. 08-90-00112-CR

Appeal from County Criminal Court
at Law No. 7

Harris County, Texas.

(TC# 8904494)

N. W. ENTERPRISES, INC.,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

JUDGMENT

This cause came on to be heard on the record of the court below, and the same being considered, and it being the opinion of this Court that there was no error in the judgment, it is therefore ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the Appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

IT IS SO ORDERED THIS 14TH DAY OF NOVEMBER, 1990.

Before Panel No. 2
Osborn, C. J., Fuller and Koehler, JJ

/s/ LARRY FULLER
Larry Fuller, Justice

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

NO. 08-90-00112-CR

N. W. ENTERPRISES, INC.,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

Appeal from County Criminal Court
at Law No. 7
Harris County, Texas.

(TC# 8904494)

OPINION

This is an appeal from a conviction for the offense of promotion of obsence material. The court assessed punishment at a fine of $5,000.00. We affirm.

In Point of Error No. One, the Appellant asserts that the court erred in denying the Appellant's motions to quash the complaint and the information because the affiant failed to state personal knowledge. The complaint in support of the information stated, in part, that:

. . .

> Before me, the undersigned Assistant District Attorney of Harris County, Texas, this day appeared the undersigned affiant, who under oath says that he has good reason to believe and does believe that in Harris County, Texas, N. W. ENTERPRISES,

> INC., hereafter styled the Defendant, heretofore on or about JANUARY 25, 1989, did then and there unlawfully commit the offense of promotion of obscene material, namely, the Defendant's agent, RAYMOND STANFORD SMITH, acting in behalf of the Defendant and within the scope of his office and employment, did intentionally sell to D. R. SINERLY obscene material, namely, two magazines entitled ANAL FUCKERS and GOLDHAIR PINKPUSSY, knowing the content and character of the material.

Tex. Code Crim. Pro. Ann. art. 15.05(2) (Vernon 1977) provides that a complaint must show that:

> [T]he accused has committed some offense against the laws of the State, either directly or that the affiant has good reason to believe, and does believe, that the accused has committed such offense.

The above-quoted complaint states that, "he has good reason to believe, and does believe. . . ." The Appellant argues that a complaint must be based on personal knowledge and that the latter phraseology of Article 15.05(2) does not pass constitutional muster. The Appellant cites *Giordenello v. United States,* 357 U.S. 480, 2 L.Ed.2d 1503, 78 S. Ct. 1245 (1958) in support of this contention contending that, under the guidelines contained in *Giordennello,* the above-mentioned statute is constitutionally inadequate. In *Giordenello* the Supreme Court invalidated a complaint supporting an arrest warrant because the evidence revealed that the affiant had no personal knowledge with regard to the allegations in the complaint. *Giordenello* is addressed only to search and arrest warrants and involves the interpretation of a federal rule of criminal procedure. The Appellant fails

to point out any evidence in the record indicating that the basis for the affiant's allegations in inadequate. Further, it has long been the law that the requisites of a complaint or affidavit to support an information are not as stringent as the requirements of a complaint or affidavit for a search or arrest warrant. *Gholson v. State,* 667 S.W.2d 168 (Tex. App.—Houston [14th Dist.] 1983, PDRR); *Wells v. State,* 516 S.W.2d 663 (Tex. Crim. App. 1975).

Point of Error No. One is overruled.

In Point of Error No. Two, the Appellant contends the court erred in denying the Appellant's motions to quash the complaint and the information because the complaint failed to identify the affiant. The Appellant maintains that the affiant's signature in both complaints is illegible and the affiant's name is not typed on either document. He maintains that his inability to identify the affiants causes him to be unable to ascertain the credibility of the affiant's and constitutes a failure of notice.

A pretrial hearing was held more than a month before trial. At this hearing, the assistant district attorney who administered the oath to the affiant visually identified the affiant although his name does not appear in the record.

We note that, on its face, the complaint complies with the requirements of Tex. Code Crim. Pro. Ann. art. 15.05 (Vernon 1977). Further, the pleadings are not required to show why the affiant is a credible person. *Woods v. State,* 499 S.W.2d 328 (Tex. Crim. App. 1973). As stated in the prior discussion, the requisites of a complaint or affidavit to support an information are not as stringent as the requirements of a complaint or affidavit for a search or arrest warrant. *Gholson v. State,* 667 S.W.2d

168 (Tex. App.—Houston [14th Dist] 1983, PDRR); *Wells v. State,* 516 S.W.2d 663 (Tex. Crim. App. 1975). The question on appeal is whether a particular defect in form in the charging instrument prejudiced the substantial rights of the defendant by not providing him with adequate notice to prepare a defense *Adams v. Smith,* 707 S.W.2d 900 (Tex. Crim. App. 1986). The first step is to decide whether the charging instrument failed to convey some requisite item of notice. If so, then the decision must be made whether, in the context of the case, this had an impact on the defendant's ability to prepare a defense and then, how great an impact. *Adams v. State,* 707 S.W.2d 900 (Tex. Crim. App. 1986).

In each complaint, the affiant was the complainant although this is not specifically stated in either complaint. This fact should have been readily apparent to the Appellant from the pretrial proceedings. However, even if we accede to a failure of notice, it is difficult to perceive how it impacted on the Appellant's ability to prepare his defense. After the Appellant learned of the affiant's visual identity at the pretrial hearing, there was no attempt on his part to attack the affiant's credibility.

Point of Error No. Two is overruled.

In Point of Error No. Three, the Appellant argues that the court erred in denying the Appellant's motions to quash the complaint and the information because the complaint failed to identify the person administering the oath. In this point of error, the Appellant alleges that, in case No. 08-90-00113-CR, the complaint fails to identify the person administering the oath. The Appellant waives this contention with regard to case No. 08-90-00112-CR. However, with regard to that case, he main-

tains that the officer administering the oath failed to obtain the identification of the affiant. With regard to the Appellant's first contention, we find that his assertion that the signature is illegible to be unfounded. It can clearly be ascertained that George Tallichet, who was the State's attorney at trial, signed the complaint. Directly beneath the signature are the typed words, "ASSISTANT DISTRICT ATTORNEY OF HARRIS COUNTY, TEXAS." The Appellant concedes that an assistant district attorney is authorized by law to administer the oath and sign the complaint. We find no error. With regard to the Appellant's second contention, he cites no direct authority to back his assertion that the administering officer must identify the affiant. Rather, he cites authority with regard to the obligations of a notary public. Again, we state that the requisites of a complaint or affidavit to support an information are not as stringent as the requirements of a complaint or affidavit for a search or arrest warrant. *Gholson v. State*, 667 S.W.2d 168 (Tex. App.—Houston [14th Dist.] 1983, PDRR); *Wells v. State*, 516 S.W.2d 663 (Tex. Crim. App. 1975). In the present case, the affiant was identified at the pretrial hearing and we find that the Appellant was not harmed.

Point of Error No. Three is overruled.

In Points of Error Nos. Four and Five, the Appellant maintains that the complaint and the information insufficiently identify and describe the magazines that were the objects of the prosecution. In Case No. 08-90-00112-CR, the description was "two magazines entitled ANAL FUCKERS and GOLDHAIR PINKPUSSY." In case No. 08-90-00113-CR the magazines were described as, "two magazines entitled 'Up Her Blonde Ass' and 'Oversexed

Wives'. . . ." The Appellant contends that these descriptions are ambiguous in that it cannot be discerned whether they reference two magazines with the same title or two magazines, each with a different title. Clearly, in the second description, the quotation marks remove this confusion. Even if we agree, arguendo, that the first description is ambiguous, we find that there was no appreciable impact on the Applelant's ability to prepare a defense pursuant to *Adams v. State*, 707 S.W.2d 900 (Tex. Crim. App. 1986). At the pretrial hearing, held more than a month before the trial, the Appellant was allowed discovery with regard to the magazines and the State was ordered to provide copies.

The Appellant also argues that the complaint and information failed to allege ownership pursuant to Tex. Code Crim. Pro. Ann. art. 21.09 (Vernon 1989). The Appellant cites no authority for this proposition other than urging strict compliance with Article 21.09 which requires that personal property alleged in an indictment be identified by name, kind, number and ownership. Tex. Penal Code Ann. § 43.23(c) (Vernon 1989), in defining promotion of obscenity, does not specifically speak in terms of ownership. Even if such an allegation were required, the complaint and information implicitly allege ownership in the allegation of a sale.

Points of Error Nos. Four and Five are overruled.

In Point of Error No. Six, the Appellant asserts that the court erred in denying his motions to quash the complaint and the information because both fail to charge the acts alleged to be obscene.

We overrule this point of error on the basis of the Opinion on Rehearing in *Thomas v. State*, 621 S.W.2d

158 (Tex. Crim. App. 1981). See Point of Error No. Seventeen.

In Point of Error No. Seven, the Appellant asserts that the court erred in denying his motions to quash the complaint and the information because both are vague and ambigious as to knowledge of content and character. The complaint and information in both cases have the allegation, "Knowing the content and character of the material . . ." placed at the end of the charging averments. The Appellant argues that this creates an ambiguity with regard to who has this knowledge, the Defendant corporation or the agent.

Tex. Penal Code Ann. § 7.22(a) (Vernon 1974) provides:

> If conduct constituting an offense is performed by an agent acting in behalf of a corporation or association and within the scope of his office or employment, the corporation or association is criminally responsible for an offense defined:

It is obvious the knowledge element flows directly from this agent to the corporation. It is difficult to perceive how any ambiguity exists.

Point of Error No. Seven is overruled.

In Point of Error No. Eight, the Appellant contends that the complaint and information violate due process and Section 7.22 of the Texas Penal Code by charging a corporation with a criminal offense before a determination that the agent's conduct constituted an offense. The Appellant argues that the phrase, "If conduct constituting an offense is performed by an agent . . ." found in Tex. Penal Code Ann. § 7.22(a) requries that the agent

be prosecuted and the offense proven before a corporate defendant can be tried. The State proved that a sale occurred and proved an agency relationship. The Appellant raised no sufficiency points with regard to these matters. The Appellant's contention is in direct opposition of Tex. Penal Code Ann. § 7.03(2) (Vernon 1974).

Point of Error No. Eight is overruled.

In Point of Error No. Nine, the Appellant argues that the court erred in denying the Appellant's motions to quash the information because, absent valid complaints, there are no valid informations. In light of the foregoing discussion, we find this contention to be without merit.

Point of Error No. Nine is overruled.

In Point of Error No. Ten, Appellant contends that the evidence was insufficient to support the jury's verdict with regard to the requisite element of scienter in each of these cases, i.e., the sales clerks' knowledge of the content and character of the material contained in the alleged magazines. With regard to the specific knowledge under the statute which the State was required to prove and the jury required to find, we accept the guidance and rationale expressed in *Hamling v. United States,* 418 U.S. 87, 123-124, 41 L.Ed.2d 590, 624, 94 S. Ct. 2887 (1974). Thus, this Court must review the record evidence to assess whether any rational trier of fact could have found beyond a reasonable doubt that the alleged clerks knew the subject matter and depictive content of the magazines, not the legal concept of its obscenity. *Jackson v. Virginia,* 443 U.S. 307, 61 L.Ed.2d 560, 99 S. Ct. 2781 (1979). The evidence was the same in each case. The officer entered and found the alleged clerk to be the sole employee on duty in the establishment. The officer

selected two magazines, sealed inside a clear plastic wrapper. An opaque white paper sleeve had been placed over the clear plastic wrapper on each magazine. The sleeve covered approximately 40 percent of the cover and could be moved up or down to reveal more of the pictorial content of the front and back covers of each magazine. The front and back covers of all four magazines explicitly depict various acts of vaginal, oral and anal intercourse. Preprinted blocks or small adhesive circles of paper partially obscure the depictions of the genital contact, but the genitals and nature of the contact is still explicitly revealed. The depictions on the front and back covers are of the same type as contained within the magazines. The subject matter in two instances (one in each cause of action) is further identified by the titles of the magazines—"Up Her Blonde Ass" and "Anal Fuckers." Each officer testified that he slid the paper sleeves to the top of the magazines, carried them to the register counter and placed them face down in front of the clerk. The clerk, being already exposed to the back covers, then turned the magazines over to obtain the price and was thus exposed to the front covers, followed by consummation of the sale. Utilizing the sleeves and magazines that were made a part of the record, we have reconstructed the actions of the officers as dsecribed in their testimony. In all instances but one, the depictions of the sexual contact described above were fully exposed. Only with regard to the back cover of "Gold Hair", and "Pink Pussy" did the white sleeve still serve to completely obscure the oral sexual contact. On the basis of this exposure of the alleged clerks to the pictorial content of the magazine covers and the titles of the two referring to anal intercourse, we conclude that there was sufficient evidence to support the verdict as to the knowledge ele-

ment. *Carroll v. State*, 701 S.W.2d 913 (Tex. Crim. App. 1986); *Glass v. State*, 761 S.W.2d 806 (Tex. App.—Houston [1st Dist.] 1988, no pet.).

Point of Error No. Ten is overruled.

Point of Error No. Eleven contends that the jury's rejection of his affirmative defense of due diligence, Tex. Penal Code Ann. § 7.24 (Vernon Supp. 1990), was against the great weight and preponderance of the evidence. The standard of review with regard to rejected affirmative defenses is expressed in *Meraz v. State*, 785 S.W.2d 146 (Tex. Crim. App. 1990), overruling, *Schuessler v. State*, 719 S.W.2d 590 (Tex. Crim. App. 1986) and *Van Guilder v. State*, 709 S.W.2d 178 (Tex. Crim. App. 1985), and vindicating, *Schuessler v. State*, 647 S.W.2d 742 (Tex. App.—El Paso, 1983).

In this case, Appellant's due diligence claim was supported only by the testimony of one Ray Hill, a self-styled consultant to the Houston adult bookstore industry on issues of obscenity. With regard to this Appellant Hill testified that the corporation had been very receptive to his efforts to ascertain what material has been found in court to be obscene and to adhere to his recommendations for removal of sush material. Upon his recommendation, the white slip covers were employed to obscure portions of magazine covers, as in this case. Again in response to his suggestion, the corporation, by sign, prohibits entry to anyone under eighteen years of age. Entry is only gained by ringing a buzzer, invoking scrutiny by the clerk before the entry door is opened. Identification reflecting age may be requested by the sales clerk following initial admittance.

In our estimation, the cited testimony amounts to no evidence of due diligence exercised for the purpose of preventing the commission of these offenses. It is certainly not of such probative force as to render the jury's rejection of the affirmative defense a manifest injustice. The slip covers, age restriction signs, door buzzer and possibility of identification check are in no way related to avoiding the promotion of obscene material. Arguably, the latter three are intended to preclude a separate offense of promoting any of the Appellant's wares to minors, whether obscene or merely sexually explicit. That does not support an application of Section 7.24 to these two cases. Furthermore, by Hill's own testimony, these procedures (particularly the magazine slip covers) were not even intended to preclude commission of obscenity offenses. but were adopted to prevent or frustrate the successful prosecution for such offenses—a far cry from the terms of Section 7.24.

The only effort expended in the direction of preventing the instant offenses is arguably depicted in Hill's statement that he attempts to identify materials found obscene in court and that Appellant has been very receptive to his recommendations in that regard. Hill did not testify that he had reviewed the magazines involved in these two cases or had even been asked to. A fair reading of his testimony reflects that his screening contribution is related more to the high visibility, newsworthy court rulings, rather than a general on-going screening of Appellant's inventory. In fact, Hill testified that such a screening is not even performed by the Appellant's staff in stocking the shelves. The materials are ordered from lists of titles without content screening. The jury's rejection

of the affirmative defense based on this evidence was eminently reasonable.

Point of Error No. Eleven is overruled.

In Point of Error No. Twelve, Appellant contends that the lower court erred in refusing to submit an instruction that conviction necessitated a finding of knowledge that the content and character of the magazines was obscene. We reject the argument under *Hamling v. United States.* Even if the scienter requirement were more demanding and specific than suggested in *Hamling,* the charge given in this case would be sufficient. A plain, reasonable reading of the charge would lead the average juror to conclude that the defendant must know the content and character of the material was obscene. This is reflected in the individual and combined import of two of the charged elements. First, in order to convict, the jury must conclude beyond a reasonable doubt that the clerks sold the magazines "knowing the content and character of the material." [Emphasis added]. This must, however, be construed in context with the preceding portion of the application paragraph requiring that the jury conclude that such sale of the material was a promotion (a knowing and purposeful state of mind) of obscene material. The paragraph also requires a finding that the clerks did "intentionally sell . . . obscene material." [Emphasis added]. One cannot intentionally sell obscene material without knowing it is obscene. Appellant's hypothetical concern is that one could be convicted for intentionally and knowingly selling a sexually explicit magazine, accidentally and without knowledge conveying some portion of which proves to be obscene. The instant charge is not so phrased. It does not charge the jury to convict for intentionally promoting and selling material which con-

tains obscenity; it charges promotion and intentional, knowing sale of obscene material. The two phrasings are not logically, legally or grammatically synonymous.

Point of Error No. Twelve is overruled.

Point of Error No. Thirteen complains of the refusal to submit a mistake of fact issue to the jury under Tex. Penal Code Ann. § 8.02 (Vernon 1974 and Supp. 1990). There was no evidence of a mistake of fact on the part of Appellant through its agents and employees with regard to the obscene content of the alleged magazines. There was no evidence of any evaluation or belief on the part of Appellant with regard to such factual issue. Nor did the testimony of Ray Hill amount to indirect or third party proof of such a defense. *See Woodfox v. State,* 754 S.W.2d 763 (Tex. App.—Houston [14th Dist.] 1988), *pet. dism'd,* 779 S.W.2d 434 (Tex. Crim. App. 1989). Absent evidence raising a factual issue of such defense, the refusal of the requested instruction was correct.

Point of Error No. Thirteen is overruled.

Point of Error No. Fourteen asserts that the court erred in its instructions to the jury by defining "patently offensive" as a facial affront to current community standards of "decency" as opposed to "tolerance." Mindful of *Red Bluff Drive-In, Inc. v. Vance,* 648 F.2d 1020 (5th Cir. 1981), *cert. denied sub nom., Theatres West, Inc. v. Holmes,* 455 U.S. 913, 71 L.Ed.2d 453, 102 S. Ct. 1264 (1982), and various subsequent Texas Court of Appeals opinions based thereon, we reject the argument for the reasons expressed in *Andrews v. State,* 652 S.W. 2d 370 (Tex. Crim. App. 1983), *aff'g in part and rev'g in part,* 639 S.W.2d 4 (Tex. App.—Houston [1st Dist.] 1982). *See also Yorko v. State,* 707 S.W.2d 680 (Tex.

App.—Houston [1st Dist.] 1986, no pet.); *Staten v. State,* 686 S.W.2d 268 (Tex. App.—Houston [14th Dist.] 1985, no pet.); *Drummond v. State,* 675 S.W.2d 545 (Tex. App. —Houston [14th Dist.] 1984, PDRR); *Garcia v. State,* 633 S.W.2d 611, 613-614 (Tex. App.—El Paso 1982, no pet.). In the context of the overall statute and the overall charge to the jury, decency and tolerance are virtually synonymous, notwithstanding their everyday lay distinction.

Point of Error No. Fourteen is overruled.

Point of Error No. Fifteen asserts that the court erred in assigning the burden of proof as to the affirmative defense of due diligence. In fact, the court's error was more favorable to the Appellant than the law would permit. Instead of being instructed on an affirmative defense with a preponderance of the evidence burden upon the Appellant, the due diligence issue was submitted as a defense under Tex. Penal Code Ann. § 2.03 (Vernon 1974). Consequently, the jury was instructed to acquit if the Appellant even raised a reasonable doubt on such issue. There being no harm to the Appellant, reversal will not result from a charge error which favors the accused. *Pogue v. State,* 474 S.W.2d 492 (Tex. Crim. App. 1971).

Point of Error No. Fifteen is Overruled.

Point of Error No. Sixteen asserts that the phrasing of the application paragraph of the charge assumed and communicated to the jury that the magazine material was in fact obscene, a contested element of the alleged offenses. The State concedes that the charge suffers from the same defect in this regard as the charge upon which reversal

was based in *Andrews v. State*. Here, however, unlike *Andrews*, the Appellant made no complaint or objection in the trial court. Applying the standard of review expressed in *Whaley v. State*, 717 S.W.2d 26, 32-33 (Tex. Crim. App. 1986), assessing the error in the context of the charge as a whole, and applying (as in *Whaley*), *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1985) (review of entire record for egregious harm from unobjected to error), we do not find reversible error. A substantial portion of the charge was devoted to definition and instruction on what constitutes obscenity, totally unnecessary if the application paragraph truly foreclosed that issue. Both sides vigorously argued whether or not the magazines were obscene, again clearly signifying that issue was ripe for jury determination.

Point of Error No. Sixteen is overruled.

Point of Error No. Seventeen, echoing the complaint made in Point of Error No. Six, contends that the conviction cannot stand because the charge failed to specify the acts depicted in the alleged magazines which the State contended and the jury found to be obscene. Furthermore, Appellant pursues his earlier complaint that such lack of specification in the underlying information will not support the charge, verdict and judgment. As noted earlier, Appellant never obtained a ruling from the court on this aspect of his motion to quash the information. We reject the present complaint upon two lines of reasoning. First, we adopt that aspect of *Stonelake v. State*, 638 S.W.2d 619 (Tex. App.—Houston [1st Dist.] 1982, rev'd in unpublished opinion) and *Taylor v. State*, 625 S.W.2d 839 (Tex. App.—Houston [14th Dist.] 1982, no pet.) which survived the opinion of the Court of Criminal Ap-

peals in *Barnhart v. State,* 648 S.W.2d 696, 699 (Tex. Crim. App. 1983). In the two lower court cases, the informations did allege a general form of obscenity, namely sodomy and anal sodomy. While not holding that even that degree of specificity was required, the Court of Appeals asserted in *Barnhart* that even more detailed allegation was definitely not required and the analyses of the First and Fourteenth Court of Appeals in the earlier cases, relying upon self-explanatory notice in the allegation of the titles of the obscene materials, was unnecessary. The present case presents the opposite scenario—no allegation of a type of obscene act but allegation of magazine titles in themselves descriptive of the type of obscenity contemplated by the information and jury charge, i.e., anal sodomy. The concept of notice specificity flowing from such descriptive titles is logical and applicable in this case.

In addition, we reject the Appellant's complaint on the basis of the Opinion on Rehearing in *Thomas v. State,* 621 S.W.2d 158, 160-164 (Tex. Crim. App. 1981). Under Tex. Penal Code Ann. § 43.21(a)(1)(B) (Vernon 1989), obscenity may take the form of various acts. In this case, however, Appellant is not charged with personally committing an obscene act. Therefore, the analysis of *Thomas* applies. The information and jury charge track the language of the statute. The statute defines the various forms of obscenity, to include those reflected in the magazine in avidence, and this element does not go to an act of the accused. *Thomas,* 621 S.W. 2d at 164. By contrast, the promotion element, also variously defined in the statute, does address an alleged act of the Appellant and accordingly was more precisely set out in both the information and jury charge.

Point of Error No. Seventeen in overruled.

Point of Error No. Eighteen contends that the denial of adult probation benefits to a corporate defendant under Tex. Code Crim. Pro. Ann. art. 17A.08 (Vernon 1977) constitutes a denial of due process and equal protection. Both corporate entity status and probation of punishment in criminal cases are creatures of statute. There is no constitutional right to probation. *Luna v. State,* 493 S.W.2d 854 (Tex. Crim. App. 1973). Admittedly, once a state establishes a probation scheme or system, the process must afford both due process and equal protection in its administration. *Campbell v. State,* 456 S.W.2d 918 (Tex. Crim. App. 1970). The statutory scheme may draw distinctions in probation eligibility based upon the nature of the offense committed, the status of the offender or the source of the probation grant (judge or jury) as long as there is a rational relationship between the statutory distinction and a legitimate State interest or objective. *Gleffe v. State,* 501 S.W.2d 672 (Tex. Crim. App. 1973); *Rangel v. State,* 486 S.W.2d 307 (Tex. Crim. App. 1972); *Washington v. State,* 456 S.W.2d 907 (Tex. Crim. App. 1970). Where defendants of the same class are treated equally under the statute there is no denial of equal protection. *Rangel.* Under Article 17A.-08, all corporations are equally ineligible for probation. Furthermore, the distinction from natural persons rationally reflects a legitimate state interest. One purpose (perhaps primary) for a system of probation is to satisfy societal needs in the area of criminal justice by a supervised period of probation rehabilitation, avoiding confinement or imprisonment. Such supervision is possible with a natural person as probationer. The same is not true of an artificial entity such as a corporation whose

actions are conducted by unlimited numbers of potentially ever-changing agents and whose very corporate existence is subject to dissolution and reconstitution in another corporate identity.

Point of Error No. Eighteen is overruled.

The judgment is hereby affirmed.

/s/ LARRY FULLER
Larry Fuller, Juistice

November 14, 1990
Before Panel No. 2
Osborn, C. J., Fuller and Koehler, JJ.

(Do Not Publish)

APPENDIX C

OFFICIAL NOTICE April 3, 1991

COURT OF CRIMINAL APPEALS

COA No: 08-90-00112-CR

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

APPENDIX D

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

NO. 08-90-00112-CR

N.W. ENTERPRISES, INC.,
Appellant,

v.

THE STATE OF TEXAS
Appellee.

Appeal from County Criminal Court
at Law No. 7
Harris County, Texas.

(TC No. 8904494)

O R D E R

The Appellant's motion to stay mandate to September 1, 1991, having been duly considered, and being of the opinion that the same should be granted; It is ORDERED that said motion be and it is hereby granted.

IT IS SO ORDERED THIS 10th DAY OF JULY, 1991.

/s/ LARRY FULLER
Larry Fuller, Justice